

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.608 OF 2019
IN
CRIMINAL APPEAL NO.398 OF 2019**

Nilesh Aluram Mhaskar

...Applicant

vs.

The State of Maharashtra

...Respondent

Mr. Nitin Sejpal a/w Ms. Pooja Sejpal for the Applicant.

Ms. M.H. Mhatre APP for the Respondent/State.

Mr. B. D. Joshi i/b Mr. Virendra V. Pethe for Respondent No.2.

**CORAM : B. P. DHARMADHIKARI &
SANDEEP K. SHINDE, JJ.**

DATE : 11/06/2019.

P.C.:

. Heard learned counsel for the applicant original accused No.3, Learned APP and learned counsel for respondent No.2. Applicant is convicted under section 302 and sentenced to suffer life imprisonment by Additional Sessions Judge, Raigad-Alibag vide Judgment dated 27/2/019 in Sessions Case No.120/2013. Other co-accused persons are also similarly sentenced.

2. Learned counsel for the applicant states that applicant has been implicated only because of deposition of PW-20, a lady who claimed to be an eye witness. The incident has taken place on 23/6/2013 and the accused persons were arrested on 29/6/2013. This lady surfaced as eye witness on 8/7/2013 and she was shown accused persons in police station and also in the Court of learned JMFC where remand was being obtained. Thereafter her statement under section 161 was recorded. Her statement under section 164 of Cr.P.C. is recorded on 17/7/2013.

3. After arrest when the investigating officer obtained remand on 29/6/2013, he has specifically mentioned before the Trial Court that there was no eye witness.

4. In this backdrop he has taken us through the evidence of said witness PW-20 to urge that her entire version appears to be improbable and no credence can be attached to it.

5. Learned APP and learned counsel for respondent No.2 state that investigating officer has fairly pointed out to learned JMFC earlier that till then there was no eye witness and remand was obtained for further investigation. During further investigation through another lady, name of PW-20 surfaced as eye witness and hence her statement under section 161 and thereafter under section 164 Cr.P.C. was recorded.

6. Both of them relied upon spot panchanama to show that deposition of PW-20 tallies with the position found on spot by Investigating Officer on 26/6/2013. According to them material seized from spot lends credence to narration of story by PW-20.

7. Learned counsel for respondent No.2 states that before conviction, the situation was entirely different and trial Court therefore might be justified in granting bail to accused No.3. However after conviction when evidence has been appreciated, the law undergoes change and at this juncture, release of accused No.3 on bail cannot be ordered.

8. The narration of facts by PW-20 shows that she happened to be a prostitute who was taken to isolated spot where alleged crime has taken place and there only one person i.e. deceased Aditya paid her money. The other two person who also happened to be accused did not pay her. She

then left the place came down to road and as she heard some uproar, by other road/way she re-climbed the hill. She then concealed herself behind some tree and from there watched the incident. She claims that she at the spot learnt that accused No.2 had made phone call to a boy and that boy then arrived on the hill. That boy happened to be accused No.3-present applicant. His name was not known to her and from talks between accused persons, she gathered the name. She has also described him. She also states that there were some blood on shirt of accused No.2-Shoeb who used dagger to kill Aditya and Shoeb burnt that shirt at some distance from the spot of murder.

9. Because she was frightened she did not attend to her business for few days and then started doing it again. On 8/7/2013 when she was at bus stop, she was summoned by police.

10. This narration therefore shows that she was not knowing present applicant had not seen him before the date of incident. Her cross examination shows that she was shown accused before her statement under sections 161 of Cr.P.C. was recorded. Investigating Officer has mentioned that as accused persons and eye witnesses were known to each other, there was no point in holding test identification parade. This explanation therefore does not appear to be correct.

11. Investigating Officer has not explained why tower location of PW-20 at the relevant time was not looked into. Though there is a map on record and also spot panchanama, there is no reference to the place where PW-20 had concealed herself and watched the entire incident. Whether at that distance she could have heard the talk between accused persons is again a disputed question and there is no explanation about it on record.

12. The fact that her statement under section 161 of Cr.P.C. was recorded after showing accused persons to her shows there is no merit in the contention that she has described accused No.3 in her statement. She was not paid in full and was also beaten allegedly by accused No.2. Thereafter she came down the hill to go to her home. Material on record does not support prima facie the narration that she re-climbed the hill to watch the incident. Necessary consequential investigation to inspire confidence into her story is absent.

13. We therefore find prima facie the material on record insufficient at this stage to arrive at a finding of guilt. We are inclined to release him on bail as he was already on bail during pendency of trial on same terms and conditions subject to his furnishing fresh bond and surety with following added conditions:-

- i) He shall give on affidavit address at which he shall always be available during pendency of appeal with his contact number;
- ii) He shall also give similar details about his sureties;
- iii) He shall attend the office of Superintendent in the Court of Additional Sessions Judge, Raigad, Alibag on first working Monday after every two months;
- iv) He shall keep alive vakalatnama of his advocate filed in the present appeal during pendency of appeal and shall not be entitled to any fresh notice of final hearing;
- v) The application is accordingly allowed and disposed of.

(SANDEEP K. SHINDE, J.)

(B. P. DHARMADHIKARI, J.)